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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 429

CHARLES CAHAN,

Defendant and Appellant,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

and

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE,

Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE SECOND APPELLATE DISTRICT, DIVISION THREE THEREOF.

TOPICAL INDEX

	Page
PROCEEDINGS BELOW	2
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTES INVOLVED	8
SUMMARY STATEMENT OF THE MATTERS INVOLVED	10

ARGUMENT:

I.

THE COURT ERRED IN REFUSING TO GIVE AN INSTRUCTION PROFFERED BY THE DEFENDANT AND APPELLANT, THE INSTRUCTION BEING UPON THE TWO REASONABLE THEORIES BASIS..... 16

II.

THE DEFENDANT WAS NOT LEGALLY COMMITTED BY A MAGISTRATE..... 18

III.

THE COURT ERRED IN PERMITTING THE READING OF THE TESTIMONY OF THE WITNESS, LEON COBERT, GIVEN BY SUCH WITNESS AT THE PRELIMINARY EXAMINATION, AND ERRED IN REFUSING THE DEFENDANT A SHORT CONTINUANCE TO PERMIT HIM TO BRING THE WITNESS, LEON COBERT, FROM LAS VEGAS, NEVADA, UNDER THE UNIFORM WITNESS ACT, OR, IN THE ALTERNATIVE, TO PERMIT THE TAKING OF THE DEPOSITION OF SUCH WITNESS IN LAS VEGAS, NEVADA.

FURTHER, WE CONTEND THAT SECTION 686 OF THE PENAL CODE OF CALIFORNIA, IN ITS CONTEXT AND IN ITS APPLICATION IN THIS CASE, WHICH BY THE TERMS THEREOF PERMITS THE READING OF THE

Page

TESTIMONY TAKEN AT THE PRELIMINARY EXAMINATION, IS UNCONSTITUTIONAL, FOR THE REASON THAT WE WERE DENIED THE RIGHT OF CROSS EXAMINATION IN THE TRIAL OF A WITNESS WHO TESTIFIED TO MATERIAL MATTERS, AND WHEN, AS IN THIS INSTANCE, EVIDENCE WAS OFFERED AS TO CONSENT BY THIS WITNESS, WHEN AT THE PRELIMINARY WE HAD NO INFORMATION THAT THIS INQUIRY WAS TO BE PURSUED; THEREFORE, WE WERE UNABLE TO CROSS EXAMINE UPON THIS SUBJECT 21

IV.

THE COURT ERRED IN ADMITTING THE TESTIMONY OF THE OFFICER, WOOTERS, RELATING TO THE INTERCEPTED TELEPHONE CONVERSATION IN THE COHERT APARTMENT, AND THE ADMISSION OF SUCH TESTIMONY WAS IN VIOLATION OF THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND OF SECTION 19, ARTICLE I, OF THE CONSTITUTION OF THE STATE OF CALIFORNIA, AND IT WAS IN VIOLATION OF THE FEDERAL COMMUNICATIONS ACT, AND IT, IN EFFECT, WAS AN UNLAWFUL SEARCH AND SEIZURE, AND AN INVASION OF THE RIGHT OF PRIVACY, AND, IN EFFECT, COMPELLED THE APPELLANT TO BE A WITNESS AGAINST HIMSELF. IT WAS ALSO A VIOLATION OF SECTION 640 OF THE PENAL CODE OF THE STATE OF CALIFORNIA WHICH MAKES THE TAPPING OF A TELEPHONE A PUBLIC OFFENSE 30

TOPICAL INDEX (CONTINUED)

	Page
V.	
THE JURY WAS GUILTY OF MISCONDUCT	37
VI.	
ERRORS OF LAW WHICH OCCURRED DURING THE COURT OF THE TRIAL WHICH DENIED THE APPELLANT A FAIR AND IMPARTIAL TRIAL	46
CONCLUSION	50

TABLE OF AUTHORITIES CITED.

Case	Page
Adamson v. People of State of California, 332 U.S. 46, 68-123, 67 S. Ct. 1672, 1683, 1684-1711, 91 L. ed. 1903	33
Boyd v. U. S., 116 U.S. 616, 6 S.Ct. 524, 29 L. ed. 746	34
Boyles v. People, 90 Colo. 32, 6 Pac. 2d 7, 10	41
Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.ed. 568	34
Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.ed 716	34
Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S. Ct. 195, 197, 35 L.ed. 1110	34
Irvine v. California, 347 U.S. 128	31
Malinski v. New York, 324 U.S. 416, 417, 89 L.ed. 1039, 65 S.Ct. 781.....	27
Mordone v. U. S., 302 U.S. 379	32
Palko v. Connecticut, 302 U. S. 319, 325, 82 L.ed. 288, 292, 58 S.Ct. 149	27
People v. Albertson, 23 Cal. 2d 550, 145 Pac. 2d ...	6, 47
People v. Bender, 27 Cal. 2d 164, 175, 177, 163 Pac. 2d 8	17
People v. Cahan, 44 Cal. 2d 434, 436, 437 --	5, 26, 30, 31, 34, 46
People v. Channell, 288 Pac. 2d 326.....	6, 47
People v. Dorland, 2 Cal. 2d 235	47
People v. Malotte, 46 A. C. 57	36
People v. Merkouris, 46 A.C. 547, 567, 568	16, 17
People v. Nelson, 90 Cal. App. 27	47
People v. Pantages, 212 Cal. 237	47
People v. Westek, 31 Cal. 2d 469, 476, 190 P. 2d 9, 13	47
Rochin v. California, 342 U.S. 165, 169.....	26, 31, 33, 46
Snyder v. Massachusetts, 291 U. S. 97, 105, 78 L. ed. 674, 677, 54 S. Ct. 330, 90 A.L.R. 575	27

TABLE OF AUTHORITIES CITED (CONTINUED)

Case	Page
United States v. Benava, 95 Fed. Rep. 2d 310	32
United States v. Reid, 53 U. S. 361, 366, 13 L. ed. 1023, 1025	41, 42
Weiss v. U. S., 308 U. S. 321	32

STATUTES

California Constitution:	
Article I, Section 13	24, 41
Article I, Section 19	4, 30, 31, 41
Article VI, Section 26	19, 41
Code of Civil Procedure of California, Sec. 1847 ...	47
General Laws, (Deering's) Judges Retirement Act, Act 5849a:	
Section 3	19
Section 3, Subsection 6	19
Section 6, Subsection 1	19
Act 5849a, as Amended by Stats. of 1951, Chapter 1641, Subsection 1, Section 6, (Judges Retirement Act)	20
Penal Code of California:	
Section 639	9, 31
Section 640	5, 9, 26, 30, 31
Section 686	4, 21, 22
Section 995	18
Section 1181, Subsections 3 and 4	41
Section 1334.1 - 1334.6, Uniform Witness Act	21, 23, 27, 28, 37
Public Utilities Code, State of California, Sec. 7903	32

STATUTES -(CONTINUED) Page

Penal Code of New York 32

FEDERAL STATUTES

United States Code, Title 47, Sec. 607 ..... 5, 30,31
U.S.C.A., Section 501 36
Section 605 ..... 26, 32, 33, 35, 36
United States Contitution:
Fourth Amendment 4, 7, 30, 31, 41
Fifth Amendment 4, 7, 30, 31, 33, 41
Sixth Amendment 7, 24, 41
Fourteenth Amendment 6, 7,20,23, 26, 27, 31, 41
United States Judicial Code, as Amended, Section 1257 (3) 3

TEXTBOOKS

8 Cal. Jur. 371, paragraph 405 17
27 Cal. Jur. 122-128 47

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE,

Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE SECOND APPELLATE DISTRICT, DIVISION THREE THEREOF.

Petitioner, CHARLES CAHAN, prays that a Writ of Certiorari issue to review the Judgment of the District Court of Appeal of the State of California, Second Appellate District, Division Three thereof, dated May 28, 1956 (See Certified Record of the District Court of Appeal, Clerk's Transcript, pp. 88, 89), Criminal No. 5555. Petition for Hearing in the Supreme Court (See Certified Record) was duly filed with the Supreme Court of the State of California, and the same was by that Court denied (June 27, 1956, 46 A.C. No. 25, Minutes, p. 2). The Judgment has now become final so far as California is concerned, and your petitioner has exhausted all of his remedies provided by law within the State of California.

The District Court of Appeal by appropriate order has withheld the issuance of the remittitur so that the petitioner might remain at liberty on bond pending his application to this Court for a Writ of Certiorari.

OPINIONS BELOW

The Opinion of the court below, the District Court of Appeal of the State of California, in and for the Second Appellate District, Division Three, affirming the judgments of conviction and orders of the Superior Court of the State of California, in and for the County of Los Angeles, denying a new trial, appears in the Certified Record. A copy of the Opinion also appears as an appendix to the Petition for Hearing in the Supreme Court (See Certified Record). The Opinion is reported in 141 Advance California Appellate Reports, p. 964; 297 Pac. 2d 715.

A Petition for Hearing in the Supreme Court of the State of California from the judgments of conviction and the orders denying a motion for new trial (See Certified Record wherein a copy of the petition is found) was denied by the said Supreme

Court (June 27, 1956, 46 A. C. No. 25, Minutes, Page 2).

JURISDICTION

The Judgment of the District Court of Appeal was entered the 28th day of May, 1956 (Certified Record, See Opinion attached to copy of Petition for Hearing in the Supreme Court).

A Petition for Hearing in the Supreme Court of the State of California was duly filed (See copy in the Certified Record); also see Minutes of the Supreme Court of the State of California, June 27, 1956, 46 A.C. No. 25, Minutes, p. 2, showing action thereon, and denial by the Supreme Court of California.)

The constitutional issues here presented were urged in the lower court. The jurisdiction of this Court is envoked under Section 1257(3) of the Judicial Code, as Amended.

QUESTIONS PRESENTED

The verdict convicted the petitioner in two counts of robbery, and the degree was fixed at second degree. A count of grand theft against the defendant was terminated by the jury acquitting the defendant thereof (Certified Record, see Clerk's Transcript, pp. 73, 74, 75).

The Questions Presented are:

I.

THE COURT ERRED IN REFUSING TO GIVE AN INSTRUCTION PROFFERED BY THE DEFENDANT AND APPELLANT, THE INSTRUCTION BEING UPON THE TWO REASONABLE THEORIES BASIS -- THIS BEING A CASE IN WHICH THE CONVICTION WAS OBTAINED IN PART UPON A SUBSTANTIAL AMOUNT OF CIRCUMSTANTIAL EVIDENCE.

II.

THE DEFENDANT WAS NOT LEGALLY COMMITTED BY A MAGISTRATE.

III.

THE COURT ERRED IN PERMITTING THE READING OF THE TESTIMONY OF THE WITNESS, LEON COBERT, GIVEN BY SUCH WITNESS AT THE PRELIMINARY EXAMINATION, AND ERRED IN REFUSING THE DEFENDANT A SHORT CONTINUANCE TO PERMIT HIM TO BRING THE WITNESS, LEON COBERT, FROM LAS VEGAS, NEVADA, UNDER THE UNIFORM WITNESS ACT, OR, IN THE ALTERNATIVE, TO PERMIT THE TAKING OF THE DEPOSITION OF SUCH WITNESS IN LAS VEGAS, NEVADA.

FURTHER, WE CONTEND THAT SECTION 686 OF THE PENAL CODE OF CALIFORNIA, IN ITS CONTEXT AND IN ITS APPLICATION IN THIS CASE, WHICH BY THE TERMS THEREOF PERMITS THE READING OF THE TESTIMONY TAKEN AT THE PRELIMINARY EXAMINATION, IS UNCONSTITUTIONAL, FOR THE REASON THAT WE WERE DENIED THE RIGHT OF CROSS EXAMINATION IN THE TRIAL OF A WITNESS WHO TESTIFIED TO MATERIAL MATTERS, AND WHEN, AS IN THIS INSTANCE, EVIDENCE WAS OFFERED AS TO CONSENT BY THIS WITNESS, WHEN AT THE PRELIMINARY WE HAD NO INFORMATION THAT THIS INQUIRY WAS TO BE PURSUED; THEREFORE, WE WERE UNABLE TO CROSS EXAMINE UPON THE SUBJECT.

IV.

THE COURT ERRED IN ADMITTING THE TESTIMONY OF THE OFFICER, WOOTERS, RELATING TO THE INTERCEPTED TELEPHONE CONVERSATION IN THE COBERT APARTMENT, AND THE ADMISSION OF SUCH TESTIMONY WAS IN VIOLATION OF THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTI - TUTION OF THE UNITED STATES, AND OF SECTION 19, ARTICLE I, OF THE CONSTITUTION OF THE STATE OF

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V.

THE JURY WAS GUILTY OF MISCONDUCT.

VI.

ERRORS OF LAW WHICH OCCURRED DURING THE COURSE OF THE TRIAL WHICH DENIED THE APPELLANT A FAIR AND IMPARTIAL TRIAL;

(A) THE GUIDING HAND IN THIS CASE IS THAT OF WOOTERS, LOS ANGELES POLICE OFFICER, WHOSE PREJUDICE AGAINST YOUR PETITIONER, CAHAN, HAS BEEN WELL ESTABLISHED BY THIS TIME. HE WAS THE SAME OFFICER WHO APPEARED AGAINST MR. CAHAN AND WHOSE CONDUCT AGAINST CAHAN WAS CRITICIZED IN PEOPLE v. CAHAN, 44 CAL. 2ND 434. DURING THE COURSE OF THE EXAMINATION OF WOOTERS, WE ATTEMPTED TO EXAMINE WOOTERS UNDER THE THEORY OF BIAS AND PREJUDICE AND TO READ TO WOOTERS A PORTION OF THE DECISION FROM PEOPLE v. CAHAN WHERE HIS CONDUCT WAS CRITICIZED BY THE SUPREME COURT OF CALIFORNIA (SEE PAGES 335 - 339, REPORTER'S TRANSCRIPT - CERTIFIED RECORD, LODGED WITH THIS COURT). WE WERE DENIED THIS RIGHT BY THE TRIAL COURT.

(B) ON CROSS EXAMINATION, YOUR PETITIONER, CAHAN,

WAS ASKED IF, IN THE MONTHS OF NOVEMBER AND DECEMBER, 1954, HIS PRINCIPAL OCCUPATION WAS NOT THAT OF OPERATING A HANDBOOK. OUR OBJECTIONS WERE OVERRULED (REP. TR., pp. 190, 191 - CERTIFIED RECORD ON APPEAL). THIS WAS AN ATTEMPT TO SHOW ANOTHER OFFENSE, WAS IMMATERIAL AND HIGHLY PREJUDICIAL, AND SUCH CONDUCT AS HAS REPEATEDLY BEEN CONDEMNED BY COURTS THROUGHOUT THE LAND, AND IN THE STATE OF CALIFORNIA.

See People v. Channell, 288 P. 2d 326;

People v. Albertson, 23 Cal. 2d 550; 145 P. 2d. THE QUESTION WAS PRESSED FURTHER OVER OUR OBJECTION.

(C) ON CROSS EXAMINATION, CAHAN, YOUR PETITIONER, WAS QUESTIONED AS TO WHETHER OR NOT HE HAD HEARD RECORDINGS OF HIS OWN VOICE IN THE PRESENCE OF OFFICER WOOTERS; THIS OVER OBJECTION. THIS WAS PREJUDICIAL; IT HAD NO BEARING UPON THE CASE, AND ONLY SERVED TO DRIVE HOME TO THE JURY THAT CAHAN HAD BEEN IN SOME OTHER TROUBLE.

(D) WOOTERS WAS ASKED, WHILE ON THE STAND, BY THE PROSECUTOR, HOW LONG HE HAD KNOWN CAHAN, AND HE REPLIED, THREE YEARS, AND THAT HE KNEW HIS OCCUPATION. THERE WAS OBJECTION. THIS INQUIRY WAS STOPPED BY THE COURT AFTER OUR OBJECTION, AND THE COURT INSTRUCTED THE JURY TO DISREGARD IT. WE SAY THE PREJUDICIAL EFFECT OF THIS INQUIRY WAS SUCH THAT AN INSTRUCTION WOULD BE OF LITTLE VALUE.

We sincerely urge the Court that these matters raise substantial Federal questions involving the denial of due process of law to the petitioner in violation of the Fourteenth

Amendment to the Constitution of the United States. We assert that there was a violation of the Sixth Amendment to the Constitution of the United States, amounting to a denial of due process of law in violation of the Fourteenth Amendment, and serious invasions of the right of privacy; unlawful search and seizure in violation of the Fourth and Fifth Amendments to the Constitution of the United States, amounting to a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

STATUTES INVOLVED

Penal Code of California, Section 686, Subsection 3, which provides as follows:

"Rights of defendant in criminal action. In a criminal action the defendant is entitled: * * *

3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead, or insane , or cannot with due diligence be found within the state; and except also that in the case of offenses hereafter committed the testimony on behalf of the people or the defendant of a witness deceased, insane , out of jurisdiction, or who cannot, with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted."

Penal Code of California, Section 640, which provides as follows:

"Fraudulent connection with telegraph, etc., wires. Penalty.

Every person who, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telegraph or telephone wires, line, cable, or instrument under the control of any telegraph or telephone company; or who willfully and fraudulently, or clandestinely, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any telegraph or telephone wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained; or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things hereinabove mentioned, is punishable as provided in section 639."

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Your petitioner, Charles Cahan, by Information filed by the District Attorney of Los Angeles County, State of California, was charged in two Counts with Robbery, and in one Count with Grand Theft. After trial by jury, he was convicted of two Counts of Robbery, and the degree fixed at second degree, and acquitted of the Count of Grand Theft. The evidence, briefly summarized, is as follows:

Sam London testified that he shared an apartment with the tenant thereof, Lee Cobert (Rep. Tr., p. 3 - Certified Record). That he and Cobert had retired, and for sometime prior to that date he had been betting on the horses through a bookie, or a man who had access to a bookmaker (Rep. Tr., p.4 - Certified Record); this man's name was Aubrey Scott, referred to as "Scotty" (Rep. Tr., p. 5 - Certified Record); he did not know the defendant and appellant Cahan; he did not know with whom Scotty was laying the bets; that he was indebted to Scott in about $1200 (Rep. Tr., p. 7 - Certified Record). That after he and Cobert had retired, someone knocked on the door and demanded entrance; two men came in, and when asked if he could identify anyone in the courtroom as one of the individuals, he replied, "I believe that the defendant is one of the individuals" (Rep. Tr., p. 10 - Certified Record); he had never seen the other man; one of the men asked, "Which one is London?" and he identified himself. The man then said, "You owe $1200 for a bookmaking debt, and we have come to collect it." London replied, "I don't happen to have that kind of money at this time." The man then walked over to where Cobert was sleeping, and on his headboard was a wallet and money clip, and the unknown man removed the money from the wallet and the money from the money clip, and put it in his pocket (Rep. Tr., p. 12, 13 - Certified Record). There was a watch on the headboard, and

it was picked up by the man identified as the defendant. Cobert's watch was picked up, and then Cobert stated he had nothing to do with it, and the watch was returned to him (Rep. Tr., p. 13 - Certified Record). There was another conversation, and one of the men said, "We ought to break his leg"(Rep. Tr., p. 14 - Certified Record). There was some conversation about taking London's watch; he protesting that it was a gift; neither man touched him; he replied that he would say he was in fear (Rep. Tr., p.18 - Certified Record). London further testified that some days later he was out of the apartment, and when he returned to the apartment there was a listening device there; he had not given his permission to install the equipment attached to the telephone (Rep. Tr., p. 60 - Certified Record); he stated that Sgt. Wooters was there in the apartment and asked if he could listen in on the conversation, and London replied he gave no answer; Wooters merely said, "I am going to listen", and he didn't object (Rep. Tr., p. 61 - Certified Record). On the telephone there was someone talking whom he did not know, and this person said, "You will get the watch back on Saturday when the balance is taken care of" (Rep. Tr., p. 105 - Certified Record); that he did receive the watch back on Saturday; that he did not know the person who returned the watch.

On cross examination, London admitted that his principal business was that of a professional gambler, and that he had placed bets with Aubrey Scott, the owner of a restaurant, and Scott in turn placed the bets, so far as he knew, with a bookmaker (Rep. Tr., pp. 107, 108 - Certified Record); that whenever he won any money Mr. Scott paid him; that whenever he lost he gave it to Scott, and that of the time of the visit of these two men, he owed Scott some $1200 (Rep. Tr., p. 109 - Certified Record). London was again asked

to identify the defendant, and he stated that he "believed it was the defendant" (Rep. Tr., pp. 114, 115 - Certified Record); that his associates had been professional gamblers and underworld characters (Rep. Tr., pp. 117 - 118 - Certified Record). The witness stated that he wore strong glasses; that he could not see perfectly without them; that at the time these individuals came to the room, his glasses were off (Rep. Tr., pp. 132, 133 - Certified Record); he took his glasses off during the interrogation, and he answered that counsel appeared hazy to him. Cahan was asked to step up, and the witness then said he believed the defendant was the man (Rep. Tr., pp. 132, 133 - Certified Record). He said somebody had talked to him about the $1200 over the telephone, but he could not identify that person's voice (Rep. Tr., p. 140, 141 - Certified Record).

Leon Cobert testified that he occupied the apartment in question, and that London lived with him; that he was asleep when someone entered the apartment. He was asked to look at the defendant; see if he could identify him, and he said, "I can't be positive." He was then asked if he had ever seen the defendant before, and he said, "No." (Rep. Tr., p. 157 - Certified Record).

Officer Wooters testified that he knew London and knew Cobert; he went to the apartment that afternoon at 4:30 with Horrell and Phelps, brother officers; that he installed a listening device in connection with the telephone (Rep. Tr., p. 27 - Certified Record); that Cobert let him in after he knocked on the door; that he asked Cobert if he could put a recorder on the telephone, and Cobert said, "Yes." (Rep. Tr., p. 29); that he knew the defendant Cahan; that he had talked with him on some occasions, but he had heard his voice through a dictaphone and a recorder, and he was familiar with it, and

that he recognized the voice of the individual on the other end of the telephone at the time he was listening in as that of the defendant Cahan (Rep. Tr., pp. 33, 34 - Certified Record). He stated he could not recall the exact wording of the conversation, but that it was to the effect that, "if you come up with the money by Saturday, you might get the watch back"; that a recording of this conversation was made (Rep. Tr., p. 38 - Certified Record). That thereafter he listened to the conversation; the recording was a true and correct one, and it was identified as People's Exhibit 1.

Aubrey Scott testified that he was a restaurant operator; that he knew London; that London owed him for wagers that he had made and lost in the amount of $1200 (Rep. Tr., p. 172, 173 - Certified Record); that he had never given any of the wagers which Mr. London gave to him to the defendant; that he did not know the defendant; that the only time he had ever seen the defendant was at the preliminary examination, and that he had never talked to the defendant on the telephone at any time (Rep. Tr., pp. 172, 173 - Certified Record).

Charles Cahan testified that on the evening of December 15th he had dinner in the restaurant called the Ebb Tide at Beverly and Vermont, in Los Angeles, in company with Mr. Coates (Rep. Tr., pp. 185, 186 - Certified Record); that later he and Coates, after talking to Mr. Bagian, the proprietor, went to the Dutch Oven Restaurant across the street, and they were either at one restaurant or the other until 12:30; from there they went to the Candle Light Restaurant at Sunset Boulevard and Laurel Canyon; they arrived there about 12:30, and were there from 12:30 to 2:15; that during that time they saw Mr. Irving Appel, the proprietor, and talked with him, and other persons; that he did not leave the premises at all that evening; that he did not know either Cobert or London (Rep.Tr.,

188, 189 - Certified Record); that neither one of these men owed him anything of value; that he did not telephone the apartment occupied by London and Cobert on the 16th, and say, "If you will come up with the money by Saturday, you might get the watch back." That he never telephoned him at any time; that Mr. London had at no time asked him for the return of a watch (Rep. Tr., p. 189 - Certified Record). The witness stated that when he heard that he was wanted for questioning, he went to headquarters and surrendered (Rep. Tr., p. 210, Certified Record).

Harold Coates testified that he knew Cahan; had known him for twelve or thirteen years; that on the evening of December 15th and the early morning of the 16th of December, 1954 (the date in question), he saw and was with Cahan; they went to the Ebb Tide Restaurant; then to the Dutch Oven across the street; then drove out to the Candle Light on Sunset Boulevard (Rep. Tr., p. 261, 262, 263 - Certified Record); they arrived at the Candle Light just a little before one o'clock; he was certain about the time; that they talked with the manager, Mr. Appel; they left about 2:15 in the morning; that they did not stop at the Hayworth Street address (the address involved); that he did not see Mr. Cobert or Mr. London that day; that he had never been to their apartment; that after arriving at the Candle Light, Mr. Cahan did not leave his presence. That on the 17th of December he was arrested by Mr. Wooters, the officer in charge, in company with another man by the name of George Travers, and taken to the police department; that he had some conversation with Wooters about the robbery of a man by the name of London (Rep. Tr., p. 270 - Certified Record); that during the course of this conversation, Wooters accused the witness, Coates, and Travers of perpetrating the robbery, and that after this conversation, Wooters, the officer, asked Coates,

"Where is Cahan?" (Rep. Tr., p. 270, 271 - Certified Record); that he later told Cahan, in substance, what had occurred to him when he was arrested, and told Cahan Wooters wanted to know where he, Cahan, was; that no complaint was issued against Coates, and that he was released from jail (Rep. Tr., pp. 271, 272). The witness stated that on the occasion when he was questioned by Wooters, that he was accused by Wooters of robbery, and the only thing Wooters asked about Cahan was, "Where could he be located?" (Rep. Tr. pp. 274, 275 - Certified Record.)

Irving Appel testified he was manager of the Candle Light Restaurant, and in the early morning of December 16th, 1954, Cahan and Coates came in about one o'clock; they left about two; they had a conversation about Coates' possibly going to work there (Rep. Tr., pp. 296, 297 - Certified Record - p. 298).

Girard Wooters was recalled as a witness, and testified that from the Candle Light bar on a Sunset Boulevard it was a block and a half to the Cobert-London apartment; about a quarter of a mile; that he walked from the Candle Light bar to the apartment, and it took him two and one-half minutes (Rep. Tr., p. 330 - Certified Record).

Robert R. Phillips was called; stated he was a police officer; that on December 15, 1954, he was working from 7 P.M. to 3:00 the next morning; that about 1:45 A.M. he went to the Candle Light bar on Sunset Boulevard; left there about 2:15; he was there about 30 minutes; that he knew Cahan, and that he saw Cahan that morning at the Candle Light bar; that Cahan was there when he arrived; that he had a conversation with him; that he also knew Coates, and that he saw Coates there that morning at the time Cahan was there (Rep. Tr., 349, 350 - Certified Record).

ARGUMENT.

I.

THE COURT ERRED IN REFUSING TO GIVE AN INSTRUCTION PROFFERED BY THE DEFENDANT AND APPELLANT, THE INSTRUCTION BEING UPON THE TWO REASONABLE THEORIES BASIS.

The evidence in this case was to the effect that London and Cobert, occupying an apartment, had been robbed by a man whom London stated he "believedwas the defendant"; Cobert was unable to make an identification. A considerable amount of the evidence was circumstantial. For instance, Cahan contended he was not at the establishment occupied by Cobert and London; that he did not know either of them; that he did not have any money due him from Mr. London; that he did not know Scott, the man who testified that London had placed the bets with him; Scott himself testified he did not know Cahan; Cahan contended he was, at or about the time of the happening of the robbery, at the Candle Light bar on Sunset Boulevard; he testified that he did not leave the bar; he was seen in the bar by the manager, Appel, who so testified; his friend, Coates, testified that Cahan was there, and never left the bar; Officer Phillips testified he came in about 1:45 in the morning, was there for about 30 minutes, and saw Cahan there. Officer Wooters testified that you could walk from the Candle Light bar to the Cobert apartment in about two and one-half minutes, that it was a quarter of a mile. It was a question of circumstances. The jury was not properly instructed upon the subject, and the Supreme Court of the State of California, as recently as June 19, 1956, in People v. Merkouris, 46 A.C. 547, at page 568, reversed the case, where the Court had failed to give the two reasonable theories instruction. The Court went

on to say in People v. Merkouris, supra, at page 567:

> "In a criminal case the prosecution must prove the defendant guilty beyond a reasonable doubt. Therefore, if the evidence is equally balanced, the defendant is entitled to an acquittal. Further, there is nothing in the proposed instruction inconsistent with the instruction on reasonable doubt. The offered instruction was a correct statement of the applicable law and should have been given."

It has been the rule in California for some time that the two reasonable theories instruction must be given. See People v. Bender, 27 Cal. 2d 164, 175, 177; 163 Pac. 2d 8, where the Court said:

> "We said, in holding that the trial court should give an instruction of its own motion, embodying the principle 'that to justify a conviction the facts or circumstances must not only be entirely consistent with the theory of guilty, but must be inconsistent with any other rational conclusion.'"

8 Cal. Jr. 371, paragraph 405.

It certainly would be a denial of due of process of law for the California courts not to give an instruction which has been established as basic law in California. It was not done in this case. It should have been done by the Court on its own motion, as the court pointed out in the case of People vs. Bender, Supra.

II.

THE DEFENDANT WAS NOT LEGALLY COMMITTED BY A MAGISTRATE.

In connection with this point, may we point out that a motion was made before the Superior Court, under Section 995, Penal Code of the State of California, to the effect that the defendant had not been legally committed by a magistrate (Clerk's Transcript, pp. 9 to 15, inclusive - Certified Record), which was to the effect that the committing magistrate, whose name has been deleted because it could serve no good purpose here, was given retirement for reason of physical disability.

We contended, and do now contend, that she was not a legally constituted judge of the municipal court, and was not able to act as a committing magistrate legally at the time the order was made holding the defendant herein to answer, for the reason that said judge retired for physical disability, on or about December 24, 1946, and her Certificate of Retirement was filed with the Secretary of State on or about January 1, 1947. Said Certificate of Retirement granted to the said judge stated in substance or effect:

> "She is incapacitated for judicial work due to a small cerebral thrombosis, which was a complication of a long standing, generalized arteriosclorosis, and an arteriosclerotic hypertension disease. This cerebral thrombosis has resulted in persistent and bothersome tinnitus; a state of over-emotionalism with some loss of memory and mental acuity. This is also an associated arteriosclerotic heart disease, which at the present time is compensated and syptomatic. Therefore, it is my opinion based on the above mentioned diagnosis,she is unable to continue

her duties... and her condition is at all times in the future likely to be of a permanent character. It is my belief that for her best interests and in the best interests of justice that she be retired from office."

The affidavit filed in support of our motion further shows that inquiry at the Employees Retirement Board disclosed that there was no evidence before that Board to the effect that said judge had ever been relieved from such disability.

The judge was permitted to retire for disability pursuant to Section 3 of the Act 5849a, known as the Judges' Retirement Act, to be found at page 2252 of the General Laws (Deering's), Volume 2, which Act provides in subsection 3 thereof for retirement for disability. The section was to the effect that if it appeared a judge was "unable to discharge efficiently the duties of his office by reason of mental disability that is or is likely to be of a permanent character, he may with the consent of all the members of the commission on qualifications provided for filling a vacancy in the office held by such justice or judge by Section 26 of Article VI of the constitution, or if it is sought to retire a justice or judge who is a member of said commission then with the consent of the two remaining members, retire said justice or judge from office with or without his consent." Subsection 6 of the same Act provides, in effect, that: "Any such retired justice or judge may, with his own consent, and upon stipulation of all of the counsel in the case or cases to which he is assigned to sit, be assigned by the chairman of the judicial counsel to sit in any court; and while so assigned shall have all the powers of a justice or a judge thereof."

This was the act as it was enacted by the Statutes

of 1941, Ch. 1181, p. 2938. Thereafter and in 1951 by the Statutes of 1951, Chapter 1641, Subsection 1, Section 6, of Act 5849a, was amended, and thereafter provided, and does now provide:

> "Any such retired justice or judge may, with his own consent, be assigned by the chairman of the judicial counsel to sit in a court of like jurisdiction as, or higher jurisdiction than, that court from which he was retired; and while so assigned shall have all the powers of a justice or judge thereof."

The effect of this amendment is to make such retired judge available for duty, without the stipulation or consent of the party or parties. There is no showing that such disability in this instance had ever been terminated, and a presumption by the chairman of the judicial counsel is not sufficient to overcome valid evidence that she had been disabled. In effect, this amounted to the creation of an extra judgeship and the recalling of a judge who had been incapacitated. Judges in California can only be elected pursuant to the Constitution, or appointed to fill an unexpired term. There is no showing in the record that such disability had ever been terminated. It is our contention that this entire proceeding and the use of this judge amounts to a violation of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

III.

THE COURT ERRED IN PERMITTING THE READING OF THE TESTIMONY OF THE WITNESS, LEON COBERT, GIVEN BY SUCH WITNESS AT THE PRELIMINARY EXAMINATION, AND ERRED IN REFUSING THE DEFENDANT A SHORT CONTINUANCE TO PERMIT HIM TO BRING THE WITNESS, LEON COBERT, FROM LAS VEGAS, NEVADA, UNDER THE UNIFORM WITNESS ACT, OR, IN THE ALTERNATIVE, TO PERMIT THE TAKING OF THE DEPOSITION OF SUCH WITNESS IN LAS VEGAS, NEVADA.

FURTHER, WE CONTEND THAT SECTION 686 OF THE PENAL CODE OF CALIFORNIA, IN ITS CONTEXT AND IN ITS APPLICATION IN THIS CASE, WHICH BY THE TERMS THEREOF PERMITS THE READING OF THE TESTIMONY TAKEN AT THE PRELIMINARY EXAMINATION, IS UNCONSTITUTIONAL, FOR THE REASON THAT WE WERE DENIED THE RIGHT OF CROSS EXAMINATION IN THE TRIAL OF A WITNESS WHO TESTIFIED TO MATERIAL MATTERS, AND WHEN, AS IN THIS INSTANCE, EVIDENCE WAS OFFERED AS TO CONSENT BY THIS WITNESS, WHEN AT THE PRELIMINARY WE HAD NO INFORMATION THAT THIS INQUIRY WAS TO BE PURSUED; THEREFORE, WE WERE UNABLE TO CROSS EXAMINE UPON THIS SUBJECT.

The District Attorney represented to the Court that Leon Cobert was residing in Las Vegas, Nevada, at 1306 Melville Street, and offered in evidence a letter from the office of the District Attorney under date of April 25, 1955, addressed to Leon Cobert at 1306 Melville Street, which letter was received as People's Exhibit 2; that thereafter the letter was received by the District Attorney's office with certain writing

on the back of the letter bearing the signature of L. Cobert; the letter was in an envelope bearing the United States postmark os Las Vegas, Nevada, May 10, 10:30 a.m., 1955. Another letter under date of June 29, 1955, addressed to Mr. Leon Cobert, 1306 Melville Street, Las Vegas, Nevada, from the District Attorney's office was received as People's Exhibit 3, and attached to this letter was an envelope, the United States postoffice postmark of Las Vegas, Nevada, under date of July 6, 1955, 7:00 P.M., addressed to the District Attorney's office, and that on the back of the letter previously mentioned there was pen and ink writing and the words and letters: "L.S.Cobert." That this letter was received in the office of the District Attorney. He also offered a carbon copy of a telegram showing a message from the District Attorney's office under date of July 19, 1955, addressed to Leon Cobert, 1306 Melville Street, Las Vegas, Nevada, and bearing the typewritten signature of Stanley M. Robertson, District Attorney's office, and that this telegram was in the course of business delivered by Western Union; this was marked Exhibit 4. Another telegram sent from Las Vegas, Nevada, addressed to Stanley M. Robertson, care of the District Attorney's office, bearing date of 8:12 p.m., July 19, 1955, and bearing on the telegram the words "L. S. Cobert" was marked Exhibit 5 (Rep. Tr., pp. 144 to 147, inclusive - Certified Record). These documents were all received in evidence as part of the foundation pursuant to Section 686 of the Penal Code, to show that Leon Cobert was out of the State of California, and in support of a request by the People to read the testimony of the witness given at the preliminary examination (Rep. Tr., pp. 147 - Certified Record). The District Attorney stated that no effort to obtain a subpoena for the production

opportunity to question Cobert on the all important subject of the permission he is alleged to have given to the police to enter his room and make the installation and listen in on the telephone conversation which Wooters attributed to Cahan. We had no way of knowing at the preliminary examination that the telephone had been tapped; it came to us as a complete surprise until just before the trial in the Superior Court, and we had no opportunity of obtaining the presence of Cobert, or taking his deposition. We were actually denied theright to be confronted by the witness Cobert, as guaranteed by the Constitution of the United States, and particularly Amendment VI thereto, which provides as follows:

"AMENDMENT VI.

Mode of Trial in Criminal Proceedings.

(Section 1.) In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Article I, Section 13, of the Constitution of California, in effect, provides that a defendant in a criminal prosecution shall have the right to appear and defend in person and with counsel, and to have the process of the court to compel the attendance of witnesses in his behalf. It also provides for the taking, in the presence of the party accused and his counsel, the depositions of witnesses in criminal cases.

of the witness Cobert in California had been made (Rep. Tr., p. 149 - Certified Record). It was then stipulated by counsel that no effort had been made under the Uniform Witness Act pursuant to Section 1334.1 to 1334.6, Penal Code of California, to produce the witness, Leon Cobert.

An objection was then made by the defendant that no sufficient foundation had been laid, and that the reading of the testimony would permit the presentment of testimony by a witness, and that it denied to the defendant the right to be confronted by the witness, and that it amounted to a denial of due process of law (Rep. Tr., pp. 150, 151 - Certified Record). This matter had been fully argued and debated in Chambers in the absence of the jury, and when this formal objection was made, we adopted by reference our argument made in Chambers (Rep. Tr., p. 151 - Certified REcord). In Chambers we suggested to the Court in connection with our argument and objection to the reading of the testimony of Cobert, and also in support of our application for continuance to permit us to seek the presence of Cobert, or to take his deposition, that the testimony given at the time of the preliminary examination was not full and complete, and that the People had offered testimony by Officer Wooters that he had permission from Cobert to make the installation in Cobert's apartment, wherein, in effect, they tapped the telephone line by the use of electronic equipment and obtained a record of conversations taken over the telephone, to which Wooters had referred and refreshed his recollection. It was our contention that Wooters and the People had brought in this testimony concerning the installation of the electronic equipment in Cobert's apartment and the tapping of the telephone wire at the time of the trial, and that no evidence whatsoever upon this subject was produced at the preliminary examination. We therefore had no

PAGES MISNUMBERED

It is certain that the law provides that a defendant in a criminal case is entitled to be confronted by the witness. It is not sufficient to say that at the preliminary the defendant was present with counsel, and that there was some cross examination of Cobert. An entirely new line of evidence was offered in the Superior Court by the prosecution, relating to the installation of the electronic device, the taking of the telephone conversation, the permission obtained-ed from Cobert - this was not touched upon at the preliminary, as heretofore urged, and we therefore had no right, nor opportunity, to go into it at that time. We were taken by surprise, and fair play and the constitutional provisions themselves, required that we be given an opportunity to examine Cobert upon this all important issue. We were virtually denied the right to meet this evidence by the refusal of the court to grant us a short continuance for the purpose of compelling the attendance of Cobert under the Uniform Witness Act, or to take his deposition. May we point out that in connection with the proceedings in Chambers, commencing at page 67 of the Reporter's Transcript through page 104, Certified Record, we informed the court, "We have obtained within the past 24 hours information that Mr. Cobert will testify under oath that he never gave these officers any permission to make that installation or to listen to that telephone conversation" (Rep. Tr., p. 72 - Certified Record).

We should point out here that the evidence obtained by the officers was illegally obtained evidence, we assert. It was obtained without permission; they entered this apartment, made an installation of an electronic device to the telephone, recorded the conversations, and refreshed their recollections from these recordings, and gave their testimony at the trial. The all important issue of whether or not they

had permission to enter this apartment and make this recording after illegally tapping a telephone wire, we should have been permitted to meet. The entry, the tapping of the telephone wire, and the recording,were in violation of the case of People v. Cahan, 44 Cal. 2d 435, and the numerous cases decided since upon the same issue.

May we point out that the interception of the telephone message was in violation of Section 605, Title 47, of the United States Code, which provides in substance as follows:

> "No person shall intercept any telephone communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such communication, without authority, and without the authority of the person engaged in that particular conversation."

The act of the police officers in entering this room and tapping this telephone, as they did, was also in violation of the wire tapping section of the California Penal Code.

See Section 640, Penal Code, State of California.

The entire prosecution was tainted by these unlawful activities (See People v. Cahan, supra),and the denial to this defendant of a reasonable request to compel the attendance of Cobert, or to take his deposition, amounted to a denial of due process of law. It was a breach of that fair play and fairness which the law compels in the conduct of the Sovereign's prosecution of its subjects.

See Rochin v. California, 342 U.S. 165, 169, where the court said:

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings

(resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses." Malinski v. New York, supra, (324 U.S. at 416, 417, 89 L. ed. 1039, 65 S. Ct. 781.) These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental", Snyder v. Massachusetts, 291 U. S. 97, 105, 78 L.ed. 674, 677, 54 S. Ct. 330, 90 A.L.R. 575, or are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U. S. 319, 325, 82 L. ed. 288, 292, 58 S. Ct. 149."

Thus we see that this Court has a duty and a right to exercise its judgment upon the whole course of the proceedings resulting in a conviction.

The Opinion of the Learned District Court of Appeal has this to say (Opinion, p. 13 - Certified Record):

"At the time the court ruled on the admission of Cobert's testimony, defendant requested a continuance for the asserted purpose of taking Cobert's deposition under the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases. Pen. Code, Secs. 1334-1334.6.) The request was denied. Defendant claims error. Counsel for defendant at the

trial represented him in the preliminary. If they had any ground for taking his deposition they had ample opportunity to interview him and to take it prior to the trial. They told the court they had learned only a day before the request was made that Cobert would testify he did not give the officers permission to install the recording device, and he had not been questioned on the subject at the preliminary, which latter was a fact. No affidavit was filed. No showing was made as to how the information was obtained or why counsel had not obtained it previously. They had listened to the recording prior to the trial."

This is not a fair deduction, and is not warranted by the evidence. Counsel had just come into possession of the knowledge that the People were about to use Cobert's testimony. We never had any advance knowledge; there was nothing in the preliminary examination to indicate that the officers would testify that they had permission to make the installation. This matter was never even touched upon at the preliminary examination. We had only been given an opportunity to listen to the recording the day before the trial. We had no fair opportunity to take a deposition of Cobert, and we were absolutely denied the right for a short continuance and for the opportunity of either taking a deposition or producing Cobert under the Uniform Witness Act. This amounts to a denial of due process of law; it is violative of our constitutional guarantees to be confronted by the witness.

Thus, you see, we were denied the right to be confronted by Cobert on a most important issue; that is to say, the right to make the installation, the right to come into the room. This was never raised at the preliminary, and we had no prior knowledge of it until the District Attorney

asked permission to read the testimony from the preliminary. The subject was never discussed at the preliminary examination, and we had no opportunity to take a deposition on a matter we had no knowledge of. The deduction by the Appellate Court is not warranted by the cold facts. We had only knowledge of the recording the day before the trial. This basic proposition cannot thus be passed off by the Learned District Court of Appeal. May we point out in this connection that the Learned District Court of Appeal stated in its Opinion, p. 3 - Certified Record):

> "Wooters, Phelps, and Horrell, members of the Los Angeles Police Department, went to the apartment about 5 p.m. on December 16; they identified themselves and Cobert invited them in. Wooters asked Cobert if he might put a recorder on Cobert's telephone. Cobert gave his permission. The officers installed an induction coil on the receiver of the telephone and ran wires to a recording device which was plugged into an electrical outlet in the wall."

The Learned District Court of Appeal only quotes Wooters' testimony. This emphasizes the necessity for our having been given a continuance in order to meet this testimony. We were advised that Cobert did not give his permission; this was only Wooters talking. We were denied the right to present the other side of the matter.

IV.

THE COURT ERRED IN ADMITTING THE TESTIMONY OF THE OFFICER, WOOTERS, RELATING TO THE INTERCEPTED TELEPHONE CONVERSATION IN THE COBERT APARTMENT, AND THE ADMISSION OF SUCH TESTIMONY WAS IN VIOLATION OF THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND OF SECTION 19, ARTICLE I, OF THE CONSTITUTION OF THE STATE OF CALIFORNIA, AND IT WAS IN VIOLATION OF THE FEDERAL COMMUNICATIONS ACT, AND IT, IN EFFECT WAS AN UNLAWFUL SEARCH AND SEIZURE, AND AN INVASION OF THE RIGHT OF PRIVACY, AND, IN EFFECT, COMPELLED THE APPELLANT TO BE A WITNESS AGAINST HIMSELF. IT WAS ALSO A VIOLATION OF SECTION 640 OF THE PENAL CODE OF THE STATE OF CALIFORNIA WHICH MAKES THE TAPPING OF A TELEPHONE A PUBLIC OFFENSE.

Officer Wooters, whose conduct toward Cahan has previously been condemned by the Supreme Court of CAlifornia (See People v. Cahan, 44 Cal. 2d 434, at 436, 437), mysteriously appeared at the apartment of Cobert. Neither Cobert nor London had complained to the police, but Wooters appeared at the apartment and made an installation of an electronic device, by which they listened in on the telephone, and recorded conversations which came in or went out over the telephone. This was unlawful. It is our contention they had no permission from either Cobert or London, the telephone company, nor the Public Utilities Commission. It was absolutely unlawful, and in violation of Section 640 of the Penal Code of the State of California. The mere fact that the recording of this conversation which Wooters attributes to Cahan was not permitted to be read by the Court, is beside the point. Wooters listened in, he had refreshed his recollection from

this recording, and he gave the substance of the intercepted telephone message. The entire proceeding was unlawful.

Before Rochin v. California, 342 U.S. 165, Irvine v. California, 347 U.S. 128, People v. Cahan, 44 Cal. 2d 434, and subsequent cases upon the right of privacy, and searches and seizures incident to arrests, and unlawful searches and seizures, perhaps our position would not have had the merit it now has. It is our sincere conviction, and we here assert, that the conduct of the officers, directed by Wooters, was unlawful, and the testimony of the intercepted telephone message should not have been received, and the court erred in so doing.

It is our contention that the interception of this telephone message was in violation of the Fourth andFifth Amendments to the Constitution of the United States, amounted to a denial of due process of law in violation of the Fourteenth Amendment to the Federal Constitution, and a violation of Section 19, Article I, of the Constitution of the State of California. It was in violation of the Federal Communications Act. It was also a flagrant violation of Section 640 of the Penal Code of California and amounted to a crime, and, in effect, compelled the appellant to be a witness against himself.

We respectfully urge that the conduct of Officer Wooters which we have heretofore described was unlawful. Section 640 of the Penal Code of California makes it unlawful to tap or make any unauthorized connection with any telephone or telegraph wire. It also makes it unlawful to attempt to use in any manner, or for any purpose, the information so obtained by such installation.

Section 639 of the Penal Code of California prohibited the use or disclosure of the contents of a telephone

or telegraph message. This Section was repealed in 1951, but is found subsequently in Section 7903 of the Public Utilities Code. There is no doubt but that these entire activities of Wooters in making this installation and intercepting the telephone message were unlawful. They are also in violation of Section 605, 47 U.S.C.A., being the Federal Communications Act.

We direct this Honorable Court's attention to the case of U. S. v. Benava, 95 Fed. Rep. 2d 310; Nordone v. U. S., 302 U.S. 379, which cases construe the use of intercepted telephone messages as being in violation of Section 605, U.S.C.A., being the Federal Communications Act. In Nordone v. U.S., supra, the Court said:

> "We nevertheless face the fact that the plain words of Section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that 'no persons' shall divulge or publish the message or its substance to 'any person'. To recite the contents of the message in testimony before a Court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments."

In Weiss v. U. S., 308 U.S. 321, the court again discussed the use of intercepted telephone messages in violation of Section 605 of the Federal Communications Act, and also discusses a provision of the Penal Law of the State of New York, making wire tapping a crime, and we believe is squarely in point. We direct this Court's attention to Weiss v. U. S., supra, and particularly at pages 330-331, where the court said:

"Statement of these facts is convincing that the so-called authorization consisting of the agreement to turn state's evidence, by some of the defendants after they had been apprised of the knowledge of their communications by the Government's representatives, and in the hope of leniency, was not that intended or described by the statute and emphasizes the offensive use which may be made of intercepted messages, whether insterstate or intrastate (emphasis ours). It is not too much to assume the interdiction of the statute was intended to prevent such a method of procuring testimony.

"We hold that Section 605 rendered the communications inadmissible, and that it was prejudicial error for the trial court to admit them either by permitting the defendants who turned state's evidence to read the transcripts or allowing the prosecutor to put the transcripts and phonographic records into evidence upon identification by the parties to the conversations."

As was said by Mr. Justice Black in his concurring opinion in the Rochin case, supra:

"Adamson v. People of State of California, 332 U.S. 46, 68-123, 67 S. Ct. 1672, 1683, 1684-1711, 91 L. ed. 1903, sets out reasons for my belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment's command that "No person *** shall be compelled in any criminal case to be a witness against himself." I think a person is compelled to be a witness against himself, not only when he is compelled to

testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science. Cf. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. ed. 746, Counselman v. Hitchcock, 142 U. S. 547, 562, 12 S. Ct. 195, 197, 35 L. ed. 1110; Bram v. United States, 168 U. S. 532, 18 S. Ct. 183, 42 L. ed. 568; Chambers v. State of Florida, 309 U. S. 227, 60 S. Ct. 472, 84 L. ed. 716. California convicted this petitioner by using against him evidence obtained in this manner, and I agree with Mr. Justice Douglas that the case should be reversed on this ground."

A fair reading of People v. Cahan, 44 Cal. 2d 434, and the remarks of Mr. Justice Traynor therein, is to the same effect. The conduct herein described is unlawful, and violates the constitutional provisions hereinbefore referred to.

That the matter of the interception of the telephone message was an important matter, and that it was discussed and considered by the jury, is attested by the affidavit of counsel found at page 79 of the Clerk's Transcript (Certified Record), and the affidavit of Jesse M. Cornelison, a detective, found at page 84 of the Clerk's Transcript (Certified Record), wherein one of the jurors stated that the jurors "kept bringing up the contents of the recordings". And one juror kept saying during the deliberations, "they had it on him; they took recordings and they know that he is guilty, but they couldn't use the evidence in court". It is seldom that we are able to learn in these cases that jurors have considered unlawfully obtained evidence, even against the instructions of the court, but here they did.

In view of the fact that there was evidence before the jury as to the interception of a telephone communication, we urge that the jury should have been instructed with reference thereto, and accordingly we proffered the following instructions:

"DEFENDANT'S REQUESTED JURY INSTRUCTION No. _____

Under Section 605 of Title 47 of the United States Code, no person having received an intercepted telephone communication, not having been authorized to accept such communication, or having become acquainted with the contents, substance, purport, effect or meaning of the same, or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same, or any part thereof.

Section 605, 47 U. S. C. A."

The above requested instruction is set forth at page 69 of the Clerk's Transcript - Certified Record, with a notation thereon that it was refused by the court.

"DEFENDANT'S REQUESTED JURY INSTRUCTION No. ____

Under Section 605 of Title 47 of the United States Code, no person, not being authorized by the sender, shall intercept any telephone communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person.

Section 605, 47 U. S. C. A.

The above requested instruction is set forth at page 70 of the Clerk's Transcript- Certified Record, with a notation thereon that it was refused by the court.

"DEFENDANT'S REQUESTED JURY INSTRUCTION No. _____

Any person who willfully and knowingly commits a violation of Section 605, 47 United States Code, shall upon conviction thereof be punished for such offense by a fine of not more than $10,000.00, or by imprisonment for a term of not more than two years, or both.

Section 501, 47 U.S.C.A."

The above instruction requested by defendant is set forth at page 71 of the Clerk's Transcript - Certified Record - with a notation thereon that it was refused by the court.

There are no other instructions upon the subject, and the jury should have been instructed as hereinabove just set forth.

The District Court disposes of this point by reference to People v. Malotte, 46 A. C. 57 (Opinion, p. 15 - Certified Record). It is our contention that the Malotte case does not settle the point. We first contend that the evidence was unlawfully received; the conversation, as interpretated by Wooters, was intertwined with his unlawful activity in making the attachment (wire tapping), and in his listening on the telephone conversation. They were joint acts. Can anyone contend that Wooters hadn't used the unlawful intercepted message for the purpose of refreshing his recollection as to the conversation allegedly given over the telephone? Certainly he did. The least that could have been done to see that justice was done was to give the instructions we requested. This was not done. We urge again that the learned District Court of Appeal is in error.

It is our contention that Cobert, whose apartment this installation was made in, never gave permission to Wooters to make the installation. What Wooters did was by weight of authority go into that apartment, and without fear or favor, set up the installation. There was no evidence that express permission had been given, and, to the contrary, had we been able to take the deposition of Cobert, or produced him under the Uniform Witness Act, we would have shown to the contrary, and would have fully explored and shown the conduct of Officer Wooters. This we were denied.

V.

THE JURY WAS GUILTY OF MISCONDUCT.

At the outset of this point, we recognize the difficulty of prevailing upon a court to set aside a verdict, and we know the laboring oar is with us. For years it has been held that the deliberations of a jury should be held inviolate, and with this we agree. All the more reason, however, that if it appears that improper consideration has been given to evidence with which they were not to concern temselves why this should be given careful consideration by a reviewing court, to the end that if it appears that a miscarriage of justice has been done that a new trial should result.

Two things occurred in the course of this trial and the deliberations of the jury that warrant careful scrutiny. We direct your attention to the affidavit of counsel at pages 79 to 82 of the Clerk's Transcript (Certified Record), the substance of which is that at the time the trial was about to begin, and outside of the courtroom of Department 39 of the

Superior Court of Los Angeles County, in which court the trial was held, the defendant was surrounded by a number of newspaper reporters, at least eight or ten, and representatives or radio and television stations. Numerous photographs were taken of the defendant Cahan, numbers of which were published in the Los Angeles daily papers during the course of the trial. A copy of one of the photographs appeared in the Los Angeles Herald Express of July 22, 1955, and a copy of said photograph and newspaper article was filed herein attached to the affidavit of counsel which appears on pages 79 to 82, inclusive, of the Clerk's Transcript (Certified Record), and said article and photograph are set forth at page 83 of the Clerk's Transcript (Certified Record). This article referred to a prior conviction of the defendant, and if it came into the hands of the jury, or to their attention, was highly prejudicial.

After the conviction in this case, a private investigator, one Jesse M. Cornelison of Riverside, California, a retired Los Angeles police officer who had spent more than twenty years in that department, many years of which were spent as a detective, was employed to make an investigation, and, among other things, he talked with one Clarence W. Neal, one of the jurors, who made a statement to Mr. Cornelison, as follows:

> "Mr. Neal stated that on the first three votes, two written and one by voice, the jury stood 7 to 5 for conviction. Those in favor of conviction hung together at one end of the table, and for awhile carried on a great deal of conversation among themselves. At other times while trying to sway those in favor of acquittal, some of them would keep bringing up the contents of the recordings, which they had been instruct-

ed by the Court to disregard. They had to be warned several times by others that they were not to consider the information in the recordings. Mr. Neal does not remember the names of all of the jurors and what each one said. One juror kept saying that "they had it on him; they took recordings and they know that he is guilty, but they couldn't use the evidence in court". Mr. Neal believes that they were referring to the officers. One statement made by a juror was, "Do you know that this man was tried and convicted in a lower court, and he must be guilty or they would not have brought it to a higher court."

"Mr. Neal also said that when they were preparing to go to dinner and knew that they would be locked up for the night, he noticed that Juror No. 1 had a shopping bag and told the other jurors that she had a newspaper in the bag, although he could not see the newspaper. He did not recall the bailiff looking at the paper or taking it away and, as far as he knows, she took the paper with her that night.

"Mr. Neal further stated that the juror who was crying, her name he does not know, was extremely upset; that he considered her condition very bad - almost to the point of hysterics or callapse. He states that she was in a very bad emotional state, and that at ome time another woman juror said that she was in an emotional condition such that she is likely to have a heart attack any minute. This juror had been holding out for acquittal and was the last one to change her vote to guilty, and did so during this emotional upset. At one time when something was said about getting a deck of cards to pass the time,

the juror who was crying stated she had some cards in her purse, and some other juror, referring to the juror that was crying, said it was a stupid idea, and at other times during the deliberations, some of the jurors seemed to be harassing her."

This quotation is to be found in the affidavit of Jesse M. Cornelison at pages 85 and 86 of the Clerk's Transcript (Certified Record).

We respectfully direct this Court's attention to the fact that this statement made by this juror to Mr. Cornelison was not denied, and stands in the record unchallenged.

It would appear therefrom that the recordings which have been referred to hereinbefore were considered by the jury at some lengths; also there was a statement by one of the jurors to the effect that "do you know that this man was tried and convicted in a lower court, and he must be guilty or they would not have brought it to a higher court." This information came to the jury undoubtedly through the newspaper article just hereinbefore referred to, but whatever the source, it was most improper.

It would appear further that one of the jurors who was voting for acquittal was the object of harrassment and pressure by those jurors who were seeking a conviction, and it was during an emotional upset being experienced by this juror that she was induced to change her vote from not guilty to guilty. This also all appears in the affidavit of Jesse M. Cornelison, and as we have heretofore said, is unchallenged (Clerk's Transcript, pp. 84 to 86, incl. - Certified Record).

We have examined the law in various jurisdictions and in the United States courts, and we do not believe that the rule can be better stated than was said in an old case,

United States v. Reid, 53 U. S. 361, 366; 13 L. ed. 1023, 1025:

"The first branch of the second point presents the question, whether the affidavits of jurors impeaching their verdict ought to be received.

"It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice." (Emphasis ours).

This quotation has been cited in numerous jurisdictions and in tests, for example:

See Boyles v. People, 90 Colo. 32; 6 Pac. 2d 7, 10;
See also Subdivisions 3 and 4, Section 1181, Penal Code of California.

We contend that the modern tendencies of reviewing courts, and the Supreme Courts of both this State and the United States, is to see to it that trials are fairly conducted; that the provisions of the United States Constitution, its amendments (the Bill of Rights), and the Constitution of the State of California, are fully preserved, and that more than lip service is done to these great provisions. It is our contention that in this case the jury violated its oath. We offered an affidavit, which is undenied. The District Attorney could have readily disproved these facts had he cared to, if it were possible to do so, but it was impossible. The affidavit speaks the truth, and it shows an intolerable condition within the jury room. It shows they violated their oaths, and that they considered the very thing they should not have considered.

The Learned District Court of Appeal disposes of

this matter (Opinion, p. 16 - Certified Record) by stating, "A juror cannot impeach his own verdict except in the single case of a verdict arrived at by chance or lot."

We have heretofore cited the case of United States v. Reid, 53 U. S. 361, 366, 13 L. ed. 1023, 1025, where the Court said:

> "It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice."

The necessity for a review of this situation, and a further consideration of these principles, is indicated by the undenied affidavit. For instance, as Neal, the juror, said, (Clerks Transcript, p. 81 - Certified Record):

> "At other times while trying to sway those in favor of acquittal, some of them would keep bringing up the contents of the recordings, which they had been instructed by the Court to disregard. They had to be warned several times by others that they were not to consider the information in the recordings. Mr. Neal does not remember the names of all the jurors and what each one said. One juror kept saying that "they had it on him; they took recordings and they know that he is guilty, but they couldn't use the evidence in the court."
>
> "Another juror said (Clerk's Transcript, p. 81 - Certified Record) " 'Do you know that this man was tried and convicted in a lower court, and he must be guilty or they would not have brought it to a higher court.'"

Surely, the Supreme Court of the United States was

right when, in Rochin, supra, they, in effect, said it was the duty of a reviewing court to consider the whole course of the steps taken in connection with the prosecution, in order that it be determined whether or not a fair trial had been had.

VI.

ERRORS OF LAW WHICH OCCURRED DURING THE COURSE OF THE TRIAL WHICH DENIED THE APPELLANT A FAIR AND IMPARTIAL TRIAL.

There are a number of matters which we wish to call to the Court's attention as briefly as we can.

(A) The guiding hand in this case is that of Wooters, Los Angeles police officer, whose prejudice against Mr. Cahan must have been well established by this time. He was the same officer, as we have stated before, who appeared against Mr. Cahan and who was referred to in People v. Cahan, 44 Cal. 2d 434. During the course of the examination of Mr. Wooters under the theory of bias and prejudice, attempted to read to Wooters a portion of the decision from People v. Cahan, supra, where his conduct was criticized (Reporter's Transcript, pp. 335 - 339, Certified Record). We were denied this right. We assert that it would hardly be beyond the ability of a human being to refrain from some bias or prejudice if he had been condemned in his official conduct as Sgt. Wooters was in People v. Cahan, supra. He was prejudiced against Cahan; there isn't any doubt about it, and we had a right to fully explore this subject. It is basic law, and hardly needs citation of authorities, that a defendant has the right to pursue an

adverse witness as to his bias or prejudice.

See C. C. P., Sec. 1847;
See cases gathered in 27 Cal. Jur. 122 - 128;
See People v. Pantages, 212 Cal. 237;
See People v. Nelson, 90 Cal. App. 27;
See People v. Dorland, 2 Cal. 2d 235.

(B) On cross examination, Mr. Cahan was asked if in the months of December and November, 1954, his principal occupation was not that of operating a handbook, to which we objected and our objection was overruled. (Rep. Tr., p. 190, 191 - Certified Record). This was plainly an attempt to show another offense. It was immaterial and highly prejudicial, and such conduct has recently been condemned in the recent case of People v. Channell, 288 Pac. 2d 326.

See People v. Albertson, 23 Cal. 2d 550, 145 P. 2d;
See People v. Westek, 31 Cal. 2d 469, 476,
190 Pac. 2d 9, 13.

This question as to whether or not Cahan was a bookmaker was pressed by the District Attorney upon two or three occasions over our objections, which were overruled by the trial court (Rep. Tr., p. 191 - Certified Record). This was a concerted effort by the prosecutor to drive home to the jury that he, at least, knew that Cahan was a bookmaker, and thus guilty of some other public offense.

(C) Again on page 206 of the Reporter's Transcript (Certified Record), it appears that the District Attorney, in cross examination of Cahan, said, "Q: And you have heard recordings of your voice in the presence of Mr. Wooters, too, haven't you?" We objected it was not proper cross examination

and not within the scope of the direct,and immaterial. The objection was overruled, and the witness was compelled to answer that he had heard recordings in the presence of Wooters. This was highly prejudicial. It had no bearing upon the case, but was merely to drive home to the jury that Cahan had been in some other trouble, even to the point that recordings had been taken of his voice and that he had listened to them in the presence of Sgt. Wooters, his pursuer.

(D) While Wooters was upon the stand, he was asked by the prosecutor how long he had known Cahan, the defendant, and he replied approximately three years. He was then asked, "Q: And do you know what his business or occupation was during that time?", to which he answered, "Yes." Then we objected it was immaterial. There was some discussion about it; then the prosecutor stated at p. 340 of the Rep. Tr., - Certified Record:

> "MR. CARR: Your Honor, there is a connection between them when we consider the testimony of Mr. London to the effect that there was a gambling obligation of approximately $1200 which he owed, and the inference that followed that in connection with this particular case. We submit that we have a right to go into that question. If it is to be believed that -- and the only testimony is that he is in the automobile business -- there is no connection between this offense or the gambling obligation and the automobile business. If it is otherwise, I think we have a right to go into it.
>
> MR. PARSONS: If your Honor please, it is with considerable reluctance that I assign the asking or the making of such a statement as misconduct, and I ask

the Court to instruct the jury to disregard it. There isn't the slightest bit of evidence in this case yet --

THE COURT: Wait a minute now. I instruct the jury to disregard everything that both counsel have said on this particular issue, and I will ask counsel to approach the bench."

It will thus be seen the prosecutor made a statement to the effect that there was a gambling obligation of $1200 which London owed, and he wanted the jury to draw the inference that he owed it to Cahan. He wanted to show that Cahan was a bookmaker, and practically told the jury that he was. We assigned the remark as misconduct, and it is true the Court instructed the jury to disregard remarks of both counsel, but that didn't cure it. Thereafter there was discussion at the bench. The court himself said he thought it was prejudicial (Rep. Tr., p. 344 - Certified Record).

Practically all of these points are passed off by the Learned District Court of Appeal. For instance, on page 18 of the Opinion of the Learned Court, this was said:

> "The cross examination was directed to matters implicit in defendant's denials. The prosecution was based on the theory that defendant was the bookmaker with whom Scottie placed the London bets; that he was the one who suffered the $1200 loss; and that that was why he went to London's apartment. The rulings were not erroneous."

There is nothing in the record to justify the statement by the District Court of Appeal that Cahan was the bookie with whom Scott placed the London bets. Scotty did not know the bookie; London did not know the bookie; Scotty did not know Cahan; London did not know Cahan; Cobert did not know Cahan;

Cobert did not know the bookie, but the District Attorney was permitted to offer evidence, and to question Cahan, and to create an unjustified inference, by his unreasonable cross examination that Cahan was, in truth and in fact, a bookmaker. He couldn't do it by direct evidence; he had none - there was none; so he attempted to dirty the waters, and to improperly cross examine the defendant.

We claim this resulted in a serious miscarriage of justice. It should not have been tolderated. It was conduct which warrants a hearing by this Court.

CONCLUSION.

WHEREFORE, your petitioner respectfully prays that this Court issue a Writ of Certiorari to the District Court of Appeal of the State of California, in and for the Second Appellate District, Division Three thereof, and that the Judgment of said court be reversed, to the end that this petitioner may have a full and fair trial in the Superior Court of the State of California, in and for the County of Los Angeles.

Respectfully submitted,

RUSSELL E. PARSONS

Attorney for Petitioner,
Charles Cahan

ALBERT JACK CHOTINER,

of Counsel.